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No. 562 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

TIME, INC.,

Appellant,

—against—

JAMES J. HILL,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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September 13, 1965.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

TIME, INC.,

Appellant,

—against—

JAMES J. HILL,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant appeals from a judgment of the Court of Appeals of the State of New York, entered on April 15, 1965, as amended on May 27, 1965, affirming a judgment of the Supreme Court of the State of New York, Appellate Division, which affirmed as to the issue of liability a judgment of the trial court in favor of appellee. In the Appellate Division Presiding Justice Botein dissented and in the Court of Appeals Judges Fuld and Bergan dissented, all being of the opinion that appellee's complaint should be dismissed.

OPINIONS BELOW

The court below affirmed on the majority and concurring opinions of the Appellate Division. Its memorandum decision of affirmance and the accompanying dissenting

opinion of Judges Fuld and Bergan, reported at 15 N. Y. 2d 986, 207 N. E. 2d 604 (1965), are set forth in Appendix A, *infra,* pp. 1a-5a. The majority and concurring opinions of the Appellate Division are set forth in Appendix B, *infra,* pp. 1b-8b, the dissenting opinion of Presiding Justice Botein in Appendix C, *infra,* pp. 1c-3c. The opinions of the Appellate Division are reported at 18 App. Div. 2d 485, 240 N. Y. S. 2d 286 (1st Dep't 1963).

JURISDICTION

This action for damages was brought under Sections 50 and 51 of the New York Civil Rights Law for invasion of privacy and resulted in a jury verdict for $125,000 compensatory damages and $50,000 punitive damages. The judgment as to the issue of liability was affirmed by the Appellate Division but was reversed on the question of damages and remanded for a reassessment of damages. The judgment entered after the proceedings on remand was affirmed by the court below by its judgment entered on April 15, 1965, as amended on May 27, 1965. Notice of appeal to this Court from that judgment was filed on July 14, 1965. The jurisdiction of this Court to review the judgment below is conferred by Title 28, United States Code, Sections 1257 and 2101(c). The following decisions sustain the jurisdiction of the Court to review on appeal the judgment below: *Garrison* v. *Louisiana,* 379 U. S. 64; *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282.

QUESTION PRESENTED

Whether Sections 50 and 51 of the New York Civil Rights Law abridge the freedom of the press guaranteed by the First and Fourteenth Amendments when they are

construed to permit the award of damages for invasion of privacy by the publication of a review of a play that resembled a prior incident involving a private person, the review and accompanying photographs being inaccurate in some particulars.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the First and Fourteenth Amendments, U. S. Const. Amend. I, Amend. XIV § 1. The statutory provisions involved are Sections 50 and 51 of the New York Civil Rights Law:

> "§ 50. *Right of privacy*
>
> "A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor."
>
> "§ 51. *Action for injunction and for damages*
>
> "Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last

section, the jury, in its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this act shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith."

STATEMENT

Appellee and his wife commenced this action on October 28, 1955, to recover damages because their name was mentioned in the February 28, 1955 issue of LIFE Magazine. They asserted that the reference in the LIFE article to them and their family constituted an invasion of their privacy in violation of Sections 50 and 51 of the New York Civil Rights Law. The jury returned a verdict against appellant in the amount of $175,000 in compensatory and punitive damages (R. 335). The Appellate Division, the presiding justice dissenting, affirmed the judgment of the trial court on the question of liability, but directed a new

trial on the issue of damages (Appendix B, *infra*, p. 6b). Upon remand, the action was discontinued as to appellee's wife and judgment in the amount of $30,000 in compensatory damages was awarded to appellee (R. 507). That judgment and the order of modification of the Appellate Division were affirmed by the court below, two judges dissenting.

In the fall of 1952 appellee and his family (the Hills) were held captive in their home in a Philadelphia suburb by three escaped convicts (R. 76-77). After a period of nineteen hours, the convicts released their hostages, unharmed, and departed (R. 413-14). The incident provoked widespread local and national attention in the press (R. 37-43, 348-49, 410). Thereafter, appellee and his family sought to retreat from the public eye and did not attempt to capitalize on the occurrence (Appendix B, *infra*, p. 1b).*

In the spring of 1953 there appeared a book entitled "The Desperate Hours", which dealt with three escaped convicts holding the members of a family (the Hilliards) as hostages in their suburban home (R. 92). According to the book, the father and son were assaulted, profanity was used, and in other ways the story differed from the account given to the press by appellee, who stated immediately after the actual incident that the convicts had been courteous, save for the restraint (Appendix B, *infra*, p. 1b). On the other hand, the book, and the ensuing play of the same name, were strikingly similar to the actual incident in terms of the names and relationships of the characters, the setting, many events occurring during the period of restraint, and the denouement (Exs. 15, B, D; Appendix A, *infra*, p. 3a; Appendix D, *infra*, pp. 1d-3d).

In 1954 "The Desperate Hours", in drama form, began pre-Broadway tryouts in Philadelphia. Following confer-

*The statement of facts has been taken in the main from the majority opinion of the Appellate Division.

ences with the producer and the author, appellant decided to review the play by means of a pictorial article (Appendix B, *infra,* p. 2b). Arrangements were made by the author to permit the taking of photographs in the home in which appellee and his family had been held captive (and which at the time of publication was no longer in their possession) (*ibid.*). Appellant transported members of the cast of the play to appellee's former home, where it photographed actual scenes from the play, and thereafter published those photographs in connection with the accompanying review (*ibid.*). The portion of that review which was quoted in the majority opinion of the Appellate Division is as follows:

> "True Crime Inspires Tense Play
>
> "Three years ago Americans all over the country read about the desperate ordeal of the James Hill family, who were held prisoners in their home outside of Philadelphia by three escaped convicts. Later they read about it in Joseph Hayes's novel, *The Desperate Hours,* inspired by the family's experience. Now they can see the story re-enacted in Hayes's Broadway play based on the book, and next year will see it in his movie, which has been filmed, but is being held up until the play gets a chance to pay off." (*Ibid.*)

The remainder of the review, which, however, was not quoted, reads:

> "The play, directed by Robert Montgomery and expertly acted, is a heart-stopping account of how a family rose to heroism in a crisis. *Life* photographed the play during its Philadelphia try-out, transported some of the actors to the actual house where the Hills were besieged. On the next page scenes from

the play are re-enacted on the site of the crime." (R. 18-20.)

How the Federal Question is Presented

A challenge to Sections 50 and 51 of the New York Civil Rights Law, as applied, was asserted in the trial court (R. 507), and in the appellate courts below, under the guaranty of freedom of the press in the First Amendment, as embodied in the Fourteenth. The court below affirmed the judgment of the Appellate Division on the majority and concurring opinions of the latter court. By amendment of its remittitur (judgment), the court below added the following:

> ". . . Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether sections 50 and 51 of the Civil Rights Law of the State of New York, as applied to defendant, were invalid under the First and Fourteenth Amendments to the Constitution of the United States. The Court of Appeals held that sections 50 and 51 of the Civil Rights Law of the State of New York, as so applied, were valid." (Appendix A, *infra,* p. 1a; 16 N. Y. 2d 658, 209 N. E. 2d 282 (1965)).

THE QUESTION IS SUBSTANTIAL

The law of privacy in New York (articulated by the majority and concurring opinions of the Appellate Division on which the judgment of the Court of Appeals rests), now imposes damages and criminal and prior restraints upon members of the press who mention a private person in a news article to which that person is relevantly connected, whenever the article is factually inaccurate, that is, in the court's view, "fictionalized". This is startling doctrine to be abroad in a nation that prides itself on freedom of expres-

sion and, specifically in this case, freedom of the press. It has come about because the law of privacy, although a late starter, has been the product in New York and elsewhere of a common law development, subject to the discretion and varying content furnished by judges in a climate that did not feel the presence of the First Amendment. Like the common law rule of *Coleman* v. *Mac Lennan,* 78 Kan. 711, 98 Pac. 281 (1908), rendered constitutional by *New York Times Co.* v. *Sullivan,* 376 U. S. 254, the tort remedy for invasion of privacy was created before there was full appreciation that the First Amendment guarantees even applied to the states. See *Gitlow* v. *New York,* 268 U. S. 652.

Messrs. Warren and Brandeis recognized in 1890 that the imposition of damages for invasion of privacy was a limitation upon the press, *The Right to Privacy,* 4 Harv. L. Rev. 193, 214 (1890), but the subsequent decisions have been based by and large upon a common law balancing in which the public's right to know is weighed against the utility of the news involved, the degree of fictionalization, the motive of the publisher, and the like. New York, for example, has greatly expanded the tort in the sixty years since it sought to remedy exploitation of a name or photograph in an advertisement. See *Robertson* v. *Rochester Folding Box Co.,* 171 N. Y. 538, 64 N. E. 442 (1902). The time has come for a decision making it clear that the First Amendment is present in what has traditionally been considered "tort territory". See Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact,* 16 Stan. L. Rev. 107, 139 (1963). As in *New York Times* v. *Sullivan, supra,* we start with "a clean slate", 376 U. S. at 299 (concurring opinion), except that the law of privacy is infected with considerable confusion resulting from the wide swings of this balancing

process, unfettered so far by constitutional mandate. And as in the *Times* case, the occasion for a "confrontation is at hand", Petition for Certiorari, p. 20, on this direct appeal involving the validity of both civil and criminal restraints upon the press.

First. Because of the balancing process out of which the law of privacy has grown, there have developed a number of doctrines which are either constitutionally impermissible or at least vulnerable to reexamination in light of the First Amendment. For example, judges have felt free to evaluate the content of matters reported in the press in terms of decency, profit motive, fictionalization, and involuntary participation in the event described. See, *e.g.*, *Binns* v. *Vitagraph Co.*, 210 N. Y. 51, 103 N. E. 1108 (1913); *Sutton* v. *Hearst Corp.*, 277 App. Div. 155, 98 N. Y. S. 2d 233 (1st Dep't 1950); *Blumenthal* v. *Picture Classics*, 235 App. Div. 570, 257 N. Y. S. 800 (1st Dep't 1932); *Leverton* v. *Curtis Pub. Co.*, 192 F. 2d 974 (3d Cir. 1951); *Mau* v. *Rio Grande Oil Company*, 28 F. Supp. 845 (N. D. Cal. 1939). On the other hand, from the beginning there has been recognition that the tort had limitations. Warren and Brandeis noted that the new right should not prohibit a publication of public or general interest, but they appeared to limit matters of public interest to those involving the public activities of public or quasi-public officials. 4 Harv. L. Rev. 193, 214-16. In the leading case to date, the Second Circuit went further and denied recovery to a former child prodigy, hardly a public official and one who had long since been removed from public notice. See *Sidis* v. *F-R Pub. Corp.*, 113 F. 2d 806 (2d Cir. 1940), *cert. denied*, 311 U. S. 711. But Judge Clarke's opinion in *Sidis* did not speak in constitutional terms, except implicitly by its reference to the public's interest in the news; nor has the decision come to enjoy the kind of respect, at least in the three states within the Second Circuit's jurisdiction, that

one would expect of a court of appeals decision bottomed on the Constitution where there has been no further elaboration from this Court.

Similarly, in New York, some of the opinions have struck out emphatically in favor of the public's right to know and in defense of items that were newsworthy. In *Gautier* v. *Pro-Football, Inc.*, 278 App. Div. 431, 435, 106 N. Y. S. 2d 553, 557 (1st Dep't 1951), *aff'd* 304 N. Y. 354 (1952), Mr. Justice Shientag noted the "over-riding social interest in the dissemination of news." See also *Sarat Lahiri* v. *Daily Mirror*, 162 Misc. 776, 782, 295 N. Y. Supp. 382, 388 (Sup. Ct. N. Y. County 1937). And in *Humiston* v. *Universal Film Mfg. Co.*, 189 App. Div. 467, 474, 178 N. Y. Supp. 752, 757 (1st Dep't 1919), the court indicated that the publisher's motive, whether instructive, or whether to satisfy morbid curiosity, was irrelevant. Nevertheless, because of the lack of a controlling constitutional rationale, the courts have often ignored these policy restrictions where their sensibilities were offended or they found little social utility in the publication. The New York decisions, cited *supra*, p. 9, are examples. Another example is *Melvin* v. *Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931), where recovery was permitted to a reformed prostitute who complained of the distribution of a movie depicting her in her former occupation. The California court affirmed the award after assessing the value of the publication as weighed against the societal interest in rehabilitation of the plaintiff. That decision has recently been criticized, but upon policy rather than constitutional grounds, namely, that the standard of good taste is not a viable rule to impose upon the working press. See *Barbieri* v. *News-Journal*, 189 A. 2d 773, 776 (Del. 1963).

Most of these cases have involved restriction of the press and of freedom of expression. Where the press has

been successful in court the stated explanation is usually that of newsworthiness, as in *Gautier* v. *Pro-Football, Inc., supra.* Where the press has been curtailed, newsworthiness is often found to be lacking or outweighed by other social interests, commercial motive, or factually inaccurate reporting which the courts have described as "fictionalization", *e.g., Sutton* v. *Hearst Corp., supra.* These are remarkable doctrines when one stops to realize that freedom of the press is at stake. Indeed, it is a rare privacy opinion where the First Amendment is even cited, nor was it mentioned in the majority and concurring opinions below.* Now that the tort territory of defamation has been made to yield to the First Amendment by the decision in *New York Times* v. *Sullivan, supra,* the tort territory of privacy at the very least demands a searching constitutional examination.

It should also be remembered that in New York the tort sanction for invasion of privacy (including, in addition to the provision for damages and exemplary damages the threat of injunction and prior restraint; see *Blumenthal* v. *Picture Classics, supra*) is coupled with a criminal sanction, and hence the very conduct for which appellant has been found liable could readily be the subject of prosecution by the State. *Cf. Garrison* v. *Louisiana,* 379 U. S. 64. Although appellee was awarded damages only under Section 51 of the New York Civil Rights Law, that section is by its terms dependent upon the language of Section 50, and the court below has certified that both of those sections are involved in this case and both have been held valid in the

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*In a very recent New York privacy case, decided after the *Times* decision, there is a grudging reference to the First Amendment: "Whatever privileges or exemptions [from literal application of sections 50 and 51 of the Civil Rights Law] have been developed in the decisional law rest on strong policy considerations and, perhaps to some extent, on constitutional guaranties of free speech and of the press." *Spahn* v. *Messner, Inc.,* 23 App. Div. 2d 216, 221, 260 N. Y. S. 2d 451 (1st Dep't 1965).

face of appellant's challenge (Appendix A, *infra,* p. 1a). *Cf. N. A. A. C. P.* v. *Button,* 371 U. S. 415, 432-33*.

Second. The law of privacy should receive no special protection merely because of the state label:

> ". . . In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels' of state law. *N. A. A. C. P.* v. *Button,* 371 U. S. 415, 429. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 269.

For nearly seventy-five years there has been some murky understanding that freedom of expression is involved in the law of privacy, and yet to this day that body of law has still to be "measured by standards that satisfy the First Amendment."

The *Times* case involved a form of liability for defamation that amounted to a penalty for sedition, because the award of damages impaired the citizen's ability to criticize elected public officials. It is hardly necessary to assert now

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*"Furthermore, the instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."

that the analogue to defamation, the law of privacy, is as central to First Amendment considerations as the problem faced in the *Times* case. There are, nonetheless, important similarities. The Court stressed that the advertisement about which the police commissioner complained did not carry a commercial message but rather a message of social protest on one of the major questions of our times. The present case is also concerned with a non-commercial message, and the First Amendment draws no distinction between reports from Broadway and reports from Montgomery. *Cf. Hannegan* v. *Esquire,* 327 U. S. 146, 157-58. The Court in the *Times* opinion pointed out that the authors of the advertisement were not members of the press but were still entitled to exercise their freedom of speech. Here we *are* dealing with members of the press. The press, after all, is specifically singled out for protection in the First Amendment and that protection involves something more than the public's right to know. It involves not only the right of the press to report the news, but also the right to investigate, to analyze, to criticize, to characterize, and even to exaggerate. The Court emphasized that "the constitutional protection does not turn up 'the truth, popularity or social utility of the ideas and beliefs which are offered.' *N. A. A. C. P.* v. *Button,* 371 U. S. 415, 445. As Madison said, 'Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.' " 376 U. S. at 271.

It is true that in the typical privacy case a public official will not be involved; instead, as here, often a private person is unwillingly catapulted into the news by events over which he has no control. In the past, because of the lack of federal mandate, certain of those situations have produced constitutionally dubious results. See, *e.g., Wagner* v. *Fawcett Publications,* No. 13541 (7th Cir. June 18, 1962), *rev'd on rehearing,* 307 F. 2d 409 (1962), *cert. denied,* 372 U. S. 909,

where there was publication of stories of the rape-murder of the plaintiff's daughter two months after the crime had occurred and the Seventh Circuit originally imposed liability before reversing itself on rehearing. See also *Mau* v. *Rio Grande Oil Co., supra.* The essential point overlooked in each case is that the victim or unwilling participant is "functioning in the public arena." See Emerson, *Toward a General Theory of the First Amendment,* 72 Yale L. J. 877, 923 (1963). His identification, or his relationship to the event or a related event, is part of the information sought by the public.

It would thus seem a short step for the Court to extend a general constitutional protection to the press against damage awards and criminal and prior restraints under the law of privacy, at least so long as the publication reveals some logical connection between the person named and the public event and makes some contribution to the dissemination of information or ideas, that is, to what is most broadly conceived to be news. See *Jenkins* v. *Dell Publishing Co.,* 251 F. 2d 447, 451 (3d Cir. 1958).

Application, therefore, of the rationale of the *Times* case to the present situation does not derive from case-matching to ascertain how far down the line it will extend beyond criticism of public officials. See *Garrison* v. *Louisiana, supra* at n. 8. *Cf. Rosenblatt* v. *Baer,* 380 U. S. 941; *Pauling* v. *News Syndicate Co.,* 335 F. 2d 659, 671 (2d Cir. 1964). The publication involved here was not defamatory and dealt with a public event in the community; it is surely entitled to some constitutional protection. See Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation,* 49 Cornell L. Q. 581, 592 (1964). The real problem is the reconciliation of appellee's right to privacy—a seminal right, possibly comparable to the Fourth and Fifth Amendment guarantees against government action—with the rigorous demands of the First Amendment.

Privacy and the sanctity of the home and bedroom have been stressed by the Court in recent decisions. See *Mapp* v. *Ohio,* 367 U. S. 643; *Griswold* v. *Connecticut,* 381 U. S. 479. "The right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men." *Olmstead* v. *United States,* 277 U. S. 438, 478 (dissenting opinion). Because of the policies emanating from the Fourth and Fifth Amendments, it is a right, even as against a non-governmental agency, that is entitled to a momentum of constitutional respect, and we do not try in any way to belittle it. Indeed, we submit that because of the importance of appellee's right to be let alone, guarded so far by New York's tort and criminal law, the question of its confrontation with the First Amendment takes on added significance. See Pedrick, *supra* at 594 n. 44. Ironically, resolution of the question presented will require a form of balancing, but this time, at last, it will be a balancing of constitutional rather than common law interests.

In evaluating the constitutional propriety of the protection that New York extends to privacy, it is also necessary to take a hard look at the part of that protection which is criminal. The Court in *Garrison* v. *Louisiana, supra,* sharply curtailed Louisiana's brand of Sedition Act. Section 50 of the New York Civil Rights Law likewise is a criminal restraint upon expression:

> "A person, firm or corporation that uses for advertising purposes, or for purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor."

Whether or not the words of the First Amendment, "Congress shall make no law . . . abridging the freedom of speech," are to be applied literally, under any approach to

the First Amendment there will be great difficulty in accommodating it to the plain language of this New York statute.

The majority and concurring opinions of the Appellate Division have stated, in effect, that appellant's conduct was such as to subject it to criminal liability under Section 50 and that an indictment based on the facts of this case would be legally sufficient. What a frightening prospect for any publisher! Now, in New York, if a news report involving a non-public person is partially inaccurate, Section 50 of the Civil Rights Law will apply in all its rigor and, apparently, the burden of establishing complete truth is to be borne by the publisher. Finally, this criminal sanction is not even aimed at a form of expression that stretches the outer limits of constitutional protection, such as defamation or obscenity. See Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 Sup. Ct. Rev. 191, 217-18. Ordinary news, not motivated by malice, can be the subject of the statute's proscription, so long as the news reporting is partially inaccurate or "fictionalized" (Appendix B, *infra*, pp. 3b, 4b). Purported fictionalization is a slim reed on which to rest this criminal curtailment of the press; at the least, it demands scrutiny under the First Amendment:

> ". . . [E]rroneous statement is inevitable in free debate . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' . . ."
>
> ". . . [F]actual error affords no warrant for repressing speech that would otherwise be free . . ." *New York Times Co.* v. *Sullivan, supra* at 271-72.

Third. In the present case, appellant reported on a current news event, to which appellee and his wife were

logically and relevantly connected. There is no dispute about this fact and it was expressly conceded by Mr. Justice Rabin (whose concurring opinion in the Appellate Division was also adopted by the majority of the court below and has thus become part of the law of New York) (Appendix B, *infra,* p. 7b). The subject of the publication was a current news event to which the prior incident was relevant. See Prosser, *Privacy,* 48 Calif. L. Rev. 383, 414 (1960). The degree to which the play and the actual incident were identical should not be constitutionally important, so long as there was some similarity, and some relevant connection between the two. In order to make absolutely clear there was a similarity, however, we have set forth in Appendix D, *infra,* pp. 1d-3d, a columnar comparison of the play and the actual incident—taken from our brief below—that was cited by Judge Fuld in his dissenting opinion (Appendix A, *infra,* p. 3a).

Conceding that appellee and his family could properly have been mentioned by appellant in its review, the courts below nevertheless imposed liability because they were offended by the manner of presentation, which somehow converted a news story into an attempt to increase circulation, the purpose of which was not to disseminate news but "solely" to enhance sales of the magazine (Appendix B, *infra,* pp. 6b-7b). Apart from the constitutionality of such judicial omniscience in the area of freedom of expression, it now should be plain that the significance of a publisher's commercial motive has been laid to rest. See *New York Times Co.* v. *Sullivan, supra* at 266. Of course part of the purpose in the present case was to sell magazines; undistributed, uncirculated, and unread journals hardly serve to promote the dissemination of information or the advancement of ideas:

> ". . . And, once it be established that the reported matter is newsworthy, I query whether the fact that

> the article may also have been intended to advertise or promote the play is, in and of itself, sufficient basis for subjecting the defendant to a cause of action under the provision of the Civil Rights Law. If the article is of such a nature as not to come within the proscription of section 51—because it is, on its face, an account of newsworthy information—it is not brought within its coverage by virtue of the fact that it may, incidentally, have been written with an eye toward promoting the play or, as is the underlying purpose of every article, in the hope of bolstering the magazine's own appeal and circulation. . . ." (Dissenting opinion of Judge Fuld below, Appendix A, *infra,* pp. 4a-5a.)
>
> "To hold . . . that a violation of section 51 may be established by a showing that a newsworthy item has been published solely to increase circulation injects an unrealistic ingredient in the complex of the right to privacy, and would abridge dangerously the people's right to know. In the final analysis, the reading public, not the publisher, determines what is newsworthy, and what is newsworthy will perforce tend to increase circulation." (Dissenting opinion of Presiding Justice Botein in the Appellate Division, Appendix C, *infra,* pp. 2c-3c.)

Whatever may have been the commercial motive for photographing scenes from a play on location rather than on the stage and for describing the play as a reenactment of a prior incident when in fact it was merely "stimulated", "inspired" and "triggered" by that incident (R. 142-143, 166; Appendix A, *infra,* p. 3a), it is of no constitutional moment:

> "For present purposes news need be defined as comprehending no more than relatively current

events such as in common experience are likely to be of public interest. In the verbal and graphic publication of news, it is clear that information and entertainment are not mutually exclusive categories. A large part of the matter which appears in newspapers and news magazines today is not published or read for the value or importance of the information it conveys. Some readers are attracted by shocking news. Others are titillated by sex in the news. Still others are entertainted by news which has an incongruous or ironic aspect. Much news is in various ways amusing and for that reason of special interest to many people. Few newspapers or news magazines would long survive if they did not publish a substantial amount of news on the basis of entertainment value of one kind or another. This may be a disturbing commentary upon our civilization, but it is nonetheless a realistic picture of society which courts shaping new juristic concepts must take into account. In brief, once the character of an item as news is established, it is neither feasible nor desirable for a court to make a distinction between news for information and news for entertainment in determining the extent to which publication is privileged." *Jenkins* v. *Dell Publishing Co.*, 251 F. 2d 447, 451 (3d Cir. 1958).

In the courts below, appellant argued its report was essentially accurate, and one that could hardly be described as fictionalized or sensational. Because we believe those characterizations are not constitutionally relevant, however, we are willing to concede in this Court that appellant's review and accompanying photographs were inaccurate to the extent they suggested the play was a reenactment of

the prior incident. Similarly, appellant argued it had every reason to believe the author of the play considered his work to have been a reenactment of the prior incident.* But the majority opinion of the Appellate Division indicates appellant was negligent in not directly putting this question to the author and because it had in its files an earlier newspaper article in which the author said his play was fictionalized (Appendix B, *infra,* p. 4b). *Cf. New York Times Co.* v. *Sullivan, supra* at 287-88.

The question, then, is whether New York can properly impose criminal and tort liability upon a publisher who connects without malice a non-public figure to a current news event in a report containing factual errors that could have been obviated by a more diligent investigation. The recital of that question suggests its inevitable answer under the First Amendment. To require the press to be totally accurate at its peril is precisely the kind of "self-censorship" that was so roundly condemned in the *Times* opinion, *supra* at 279. Under such a rule, the press, like the citizen-critic, will also "steer far wider of the unlawful zone" (*ibid.*). Like the citizen-critic, who has a duty to judge his government (*id.* at 282), the fourth estate has a duty to report the news. If that duty is encumbered by liabilities arising out of factual error or exaggeration, then it will not always be fully discharged, and the entire community suffers. Especially is this so where publication occurs only at the risk of criminal sanctions or of crippling damage awards which hinge on the ability to persuade twelve persons, after the event, of the whole "truth". As Presiding Justice Botein warned in his dissenting opinion in the Appellate Division, "we are in a domain where 'the lines may not be drawn so tight as to imperil more than we protect' . . ." (Appendix C, *infra,* p. 2c).

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*See R. 189, 197, 287-88, 297-98.

In *Garrison* v. *Louisiana, supra* at 73, the Court's footnote 9 seems to prophesy the arrival of this very case: "Even the law of privacy, which evolved to meet Lord Campbell's reservations ["forgotten misconduct . . . wantonly raked up"] recognizes severe limitations where public figures or newsworthy facts are concerned. See *Sidis* v. *F-R Pub. Corp.*, 113 F. 2d 806, 809-10 (C. A. 2d Cir. 1940)." If the *Sidis* decision had been given the proper constitutional respect by state courts and, in particular, those of New York, the common law "limitations" of policy might have been sufficient to forestall constitutional scrutiny of the law of privacy. As we have said, that has not proved to be the course the law has taken, and the perfect example is the present case, where, indeed, "newsworthy facts are concerned."

In its preceding footnote 8, at 72, the Court made clear it was expressing no views "as to the impact of constitutional guarantees in the discrete area of purely private libels." Here, on the other hand, we are not only dealing with something other than libel, that is, a non-defamatory publication (actually laudatory in this case) but also with a field that is anything but isolated or private. Appellee and his wife and children were involved, albeit involuntarily, in an event of considerable public significance, which appellant recalled when it reported on another public event. The latter event was significant on two counts: first, because of its occurrence as a dramatic play on Broadway, and, second, because of the play's subject, a problem of interest to a child-centered population already disturbed by the rising incidence of crime.* Appellee would prefer to forget the former event, but even the concurring opinion below noted that "the Hill incident could have been referred to in the article

*For a current news report of a similar episode, see N. Y. TIMES, July 9, 1965, p. 1, col. 5.

reviewing the play without subjecting the defendant to liability despite the fact that to do so would consitute an invasion of the Hills' privacy and might cause them grief and distress" (Appendix B, *infra,* p. 7b). Some involuntary participation in the news is perhaps the only answer if the press is to be left free to "discuss public affairs with impunity." See *New York Times Co.* v. *Sullivan, supra* at 296 (concurring opinion).

The constitutional protection afforded the defamatory statements involved in *Garrison* v. *Louisiana, supra* at 75, will yield only upon proof of the "calculated falsehood". In contrast, in the present case we find a non-defamatory report about a public event, inaccurate in some particulars because the publisher failed to unearth all of the facts. The contrast, and the long standing immunity of this branch of tort territory from constitutional examination, requires review now so that a *federal* rule can be established. See *N. Y. Times Co.* v. *Sullivan, supra* at 279. Even where the privacy tort has been confined in a way that would appear to satisfy constitutional requirements, for example, *Sidis* v. *F-R Pub. Corp., supra,* there has been insufficient check on the variant directions taken by other courts in their common law development. Long before the *Times* decision, the Supreme Court of Kansas in *Coleman* v. *MacLennan,* 78 Kan. 711, 98 Pac. 281 (1908), had worked out a rule which, as it eventually turned out, was the right one. A number of jurisdictions had followed that decision, but the Court felt obliged, nonetheless, to make it crystal clear there was but a single federal rule on the subject, and that it was the First Amendment being expounded.

We submit that the decision below, upholding the validity of the New York statutes in the face of appellant's constitutional challenge, requires that a comparable federal rule be announced, this time for application to the law of

privacy. It is possible to anticipate that such a rule might not be too different from that established for libel. So long as there is some "social value" in the matter published, *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572, it should be constitutionally protected from tort or criminal sanctions for invasion of privacy. The protection would yield upon proof that the non-public figure was connected to the news item because of actual malice on the part of the publisher toward that person or because of the publisher's flagrant and reckless disregard for the truth. Such a rule would protect the press from self-censorship, but at the same time would not destroy the privacy tort, especially in cases where advertisers make use of names for endorsement purposes without consent, the precise situation for which the tort remedy was created. See *Robertson* v. *Rochester Folding Box Co.,* 171 N. Y. 538, 64 N. E. 442 (1902); *cf. Valentine* v. *Chrestensen,* 316 U. S. 52.

In any case, the proper rule to be articulated is the task for the Court; it can be more fully considered by the parties if there are to be briefs on the merits. Suffice it to say, at this point, the question is substantial.

Respectfully submitted,

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